

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ANDREW S. KENNEDY

Appellant.

No. 36740-8-II

UNPUBLISHED OPINION

Armstrong, J. — Andrew S. Kennedy appeals his conviction of homicide by abuse, arguing that he did not validly waive a jury trial because the trial court failed to advise him that he was also waiving a jury on the aggravating sentencing factors. Finding no reversible error, we affirm.

FACTS

In 2004, Kennedy assumed custody of his cousin's 10-month-old daughter, Kiernyn Severson. Two months later, Kiernyn died when Kennedy took her into his bedroom and intentionally swung her head into a stationary object with violent force. Kennedy had also intentionally hurt Kiernyn several times before her death, leaving large bruises on her arms and head, breaking her arm, and intentionally stopping her breathing for short periods.

The State charged Kennedy with first degree murder and homicide by abuse. The State also charged the following aggravating circumstances for sentencing purposes: (1) that Kennedy knew or should have known that the victim of the crime was particularly vulnerable or incapable of resistance due to extreme youth, (2) that Kennedy used a position of trust or confidence to facilitate the commission of the crime, and (3) that Kennedy demonstrated or displayed an

egregious lack of remorse. *See* RCW 9.94A.535(3)(b), (n), and (q).

Kennedy filed a written waiver of his right to a jury trial. The waiver stated:

The undersigned defendant acknowledges that he/she is aware of the following matters concerning waiver of right to a jury trial:

1. I have been informed and fully understand that under the Constitution of the United States and the State of Washington, and the Criminal rules for Superior Court, I have the right to have my case heard by an impartial jury selected from the county where the crime(s) is/are alleged to have been committed.
2. I know that I could take part in the selection of the jury who would determine my guilt or innocence.
3. In a jury trial, the State must convince all of the twelve citizens of my guilt beyond a reasonable doubt. In a trial by judge, the State must only convince the judge beyond a reasonable doubt.
4. I have consulted with my lawyer regarding the decision to have my case tried by a jury or by the Court.
5. I freely and voluntarily give up my right to be tried by a jury and request trial by the Court.

Clerk's Papers at 209.

The trial court accepted Kennedy's waiver of a jury trial after engaging in the following colloquy:

[COURT]: Mr. Kennedy, you understand that you have a right to go to trial in front of a jury and in that jury there would be twelve people who would decide whether you are [guilty] or not [guilty]. Do you understand that?

DEFENDANT: Yes, Your Honor.

[COURT]: You would be entitled, along with your attorneys, to question potential jurors and you would be involved in the selection process of the jury. Do you understand that?

DEFENDANT: Yes, Your Honor.

[COURT]: Alright. And you had discussed this with your attorneys, I understand. Is that correct?

DEFENDANT: Yes, Your Honor.

[COURT]: And you now are asking to be tried by judge alone which means by requesting that you are waiving your right to . . . a jury trial and one person, a judge sitting up here will make the decision whether you are guilty or not guilty. Do you understand that?

DEFENDANT: Yes, Your Honor.

[COURT]: Is that your desire to waive your right to a jury trial, to be tried by a judge?

DEFENDANT: Yes, Your Honor.

[COURT]: Alright. Are you entering this request voluntarily?

DEFENDANT: Yes, Your Honor.

[COURT]: Alright. And so instead of having to convince twelve people beyond a reasonable doubt at this point it would be one person beyond a reasonable doubt and that would be the judge. Do you understand that?

DEFENDANT: Yes, Your Honor.

3 Report of Proceedings (RP) (July 23, 2007) at 211-12.

After a bench trial, the trial court found Kennedy guilty of second degree murder and homicide by abuse. It also found two aggravating circumstances: (1) Kennedy knew or should have known that Kiernyn was particularly vulnerable and incapable of resisting the crime due to extreme youth, and (2) Kennedy abused a position of trust to facilitate the commission of the crime.

The trial court entered judgment on the homicide by abuse and dismissed the second degree murder conviction to avoid double jeopardy concerns. Kennedy's standard sentencing range was 240 to 320 months, but because of the aggravating factors found at trial, the trial court imposed an exceptional sentence of 380 months.

ANALYSIS

I. Waiver of Jury

Kennedy argues that the waiver of his right to a jury trial was invalid because the trial court did not advise him that he was also waiving a jury on the alleged aggravating sentencing factors.

Kennedy's argument presupposes that a waiver of jury trial applies only to the

determination of the underlying crime unless the defendant explicitly waives his right as to aggravating factors. But the statutory scheme providing the procedures for deciding aggravating factors undermines this assumption. RCW 9.94A.537(4) provides that “[e]vidence regarding any facts supporting aggravating circumstances . . . shall be presented to the jury during the trial of the alleged crime, unless the jury has been impaneled solely for resentencing.” And if a jury is waived, that evidence shall be presented to the court. RCW 9.94A.537(3). Because this statutory scheme requires the fact finder to decide the aggravating factors in the same proceeding as the underlying crimes, the right to a jury trial is not bifurcated. Waiver of a jury encompasses both inquiries as a matter of law. Indeed, Kennedy acknowledges that “RCW 9.94A.537 doesn’t permit a hybrid waiver of one right but not the other.” Br. of Appellant at 18.

Kennedy argues that his waiver of a jury trial was invalid because the trial court did not advise him that it included a waiver on the aggravating factors. In general, trial courts are not required to engage in a full colloquy with the defendant on the record to establish that the defendant knew the relative advantages and disadvantages of waiving a jury. *State v. Stegall*, 124 Wn.2d 719, 725, 730, 881 P.2d 979 (1994) (citing *City of Bellevue v. Acrey*, 103 Wn.2d 203, 211, 691 P.2d 957 (1984)). Only a “personal expression of waiver” from the defendant is required. *Stegall*, 124 Wn.2d at 725. Nonetheless, the State bears the burden of proving that Kennedy waived his constitutional right knowingly, intentionally, and voluntarily. *Stegall*, 124 Wn.2d at 724, 730. And the validity of any waiver of a constitutional right depends on the circumstances of each case. *Stegall*, 124 Wn.2d at 725.

Here, the trial court and counsel undertook to advise Kennedy of his rights and the

consequences of his jury waiver in detail. Yet both the oral and written warnings focused solely on the jury's determination of guilt or innocence. We are satisfied that under the circumstances of this case, Kennedy knew that his waiver encompassed the aggravating factors. He did not object to the State's evidence of the aggravating factors or to its closing argument dealing with the aggravating factors. In fact, Kennedy himself presented substantial evidence on the aggravating factors, particularly that he did not demonstrate an egregious lack of remorse. He called lay witnesses who testified that he typically did not openly show sadness, depression, or other emotional distress, and he also called an expert witness who testified that distress from a child's death can often present as stoic, quiet behavior and that Kennedy had "affectual flatness." 14 RP (Aug. 15, 2007) at 1402. Finally, Kennedy did not raise the jury trial issue when the court orally ruled that the State had proved two of the aggravating factors. We agree with the State that Kennedy's full participation in the aggravating factors portion of the trial shows that he understood that his jury waiver extended to the aggravating factors.

II. Statement of Additional Grounds

A. Right to Testify

In a pro se statement of additional grounds for review (SAG), RAP 10.10, Kennedy states that he "was denied his constitutional right to take the stand in his own defen[s]e." SAG at 1. He provides no explanation or citation to the record or legal authority. And our review of the record provides no factual support for the claim. Consequently, we do not further review it. *See* RAP 10.10(c).

B. Findings of Fact

Kennedy also asserts that “[n]umerous eye witness statements were not put into the findings of fact” and that those statements “could have very well changed the outcome of the trial.” SAG at 1. But a trial court is not required to make findings of fact on all matters about which there is evidence in the record, only those that “establish the existence or nonexistence of determinative factual matters need be made.” *In re Det. of LaBelle*, 107 Wn.2d 196, 219, 728 P.2d 138 (1986). In this case, the trial court found that Kennedy was alone with Kiernyn when she died. This finding includes the implicit finding that there were no eyewitnesses to the crime and that, by extension, any witnesses who testified otherwise were not credible. We leave the ultimate issues of weighing the evidence to the fact finder and do not review credibility decisions. *State v. Montgomery*, 163 Wn.2d 577, 590, 183 P.3d 267 (2008); *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Bridgewater, P.J.

Hunt, J.

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